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In the Supreme Court of the United States

OCTOBER TERM, 1995

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the President had the authority to promulgate Rule for Courts-Martial 1004 which prescribes aggravating factors for cases in which the death penalty is otherwise expressly authorized by the Uniform Code of Military Justice.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Armed Forces (Pet. App. 1a-227a) is reported at 41 M.J. 213. The initial opinion of the United States Army Court of Military Review, now the United States Army Court of Criminal Appeals (Pet. App. 229a-256a), is reported at 34 M.J. 956, and its opinion denying reconsideration (Pet. App. 257a-265a) is reported at 34 M.J. 1065.

JURISDICTION

The judgment of the United States Court of Appeals for the Armed Forces was entered on November 10, 1994. A petition for reconsideration was denied on February 2, 1995. Pet. App. 228a. On April 21, 1995, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including June 2, 1995, and the petition was filed on that date. The petition

for a writ of certiorari was granted on September 27, 1995. 116 S. Ct. 39. The jurisdiction of this Court rests upon 28 U.S.C. 1259(1) (Supp. V 1993).

STATUTES, RULE, AND CONSTITUTIONAL PROVISIONS INVOLVED

Articles 18, 36, 56, 106a, and 118 of the Uniform Code of Military Justice, 10 U.S.C. 818, 836, 856, 906a, and 918, and Rule for Courts-Martial 1004, are reprinted in the Joint Appendix, J.A. 139-145, 132-138. Relevant provisions of Articles I and II of the Constitution, and Article 55 of the Uniform Code of Military Justice, are reproduced in the appendix to this brief, *infra*, 1a-3a.

STATEMENT

Petitioner was convicted by a general court-martial of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118, 80, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918, 880, and 922. The court sentenced petitioner to death, a dishonorable discharge, and forfeiture of all pay and allowances. The United States Army Court of Military Review affirmed. 34 M.J. 956 (Pet. App. 229a-256a), reconsideration denied, 34 M.J. 1065 (A.C.M.R. 1992) (Pet. App. 257a-265a). The United States Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a.

1. In *United States* v. *Matthews*, 16 M.J. 354 (1983), the United States Court of Military Appeals (now the United States Court of Appeals for the Armed Forces) analyzed the constitutionality of Article 118 of the UCMJ, 10 U.S.C. 918, which authorizes the imposition of the death penalty on defendants who are found guilty of certain murders. The court concluded that *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), and its progeny, which assessed the constitutionality of state death penalty schemes, would apply without modification to the imposition of the death penalty in the military, at least when the

offense is not inherently military but has a civil analogue. 16 M.J. at 368-369.

After reviewing this Court's Eighth Amendment cases, the *Matthews* court concluded that certain features appeared in a constitutionally valid death penalty procedure: a bifurcated sentencing proceeding; specific aggravating circumstances to be identified by the sentencing authority; selection of and findings on the particular aggravating circumstances used by the sentencer to impose the death penalty; unrestricted opportunity for the defendant to present mitigation and extenuation evidence; and mandatory appellate review of the appropriateness of the sentence. 16 M.J. at 377. The court found all of those safeguards present in the military system except for a requirement that court members identify the specific aggravating factors upon which they relied in imposing the death penalty. *Id.* at 379. Because of the absence of that safeguard, the court reversed Matthews' death sentence. *Id.* at 381-382. The court concluded, however, that either Congress or the President, in his capacity as Commander-in-Chief and/or pursuant to the powers that Congress delegated to him, could remedy the defect. *Id.* at 380 (citing Article 36 of the UCMJ, 10 U.S.C. 836).

On January 24, 1984, "[b]y the authority vested in [him] as President by the Constitution of the United States and by Chapter 47 of Title 10 of the United States Code [*i.e.*, the UCMJ]," the President responded by promulgating an amendment to the extant *Manual for Courts-Martial* (*Manual*) that provided procedures for adjudicating cases in which the death penalty is authorized by the UCMJ. See Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). When a new revision of the *Manual* was published later that year, the provisions of the Executive Order were included as Rule for Courts-Martial (RCM) 1004. See *Manual* (1984 ed.).[1]

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[1] Prior to the decision in *Matthews*, the Department of Defense announced and solicited comments on the proposed changes to the

Briefly summarized, RCM 1004 requires that, before a death penalty may be imposed following a general court-martial conviction of an offense for which Congress has expressly authorized the death penalty, the accused must have been notified, prior to trial, of the aggravating factors the prosecution intends to prove; the members of the court-martial must unanimously find the existence of at least one of the aggravating factors specified in the Rule; the accused must be given broad latitude to present evidence in extenuation and mitigation; and the members must concur that such extenuating or mitigating circumstances are "substantially outweighed" by any aggravating circumstances found to exist. See RCM 1004(b). In addition, the Rule prescribes a list of aggravating factors, some of which apply to all capital offenses, others of which apply exclusively to specifically enumerated crimes. See RCM 1004(c).

2. During the evening of December 11, 1988, petitioner, an Army private stationed at Fort Hood, Texas, robbed at gun point two different 7-Eleven convenience stores in Killeen, Texas. In the first robbery, petitioner fired two shots into the counter and soda fountain, which were behind the cashier; he obtained $38. In the second

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Manual it was then considering for recommendation to the President, which included RCM 1004. See 48 Fed. Reg. 23,688 (1983); *Matthews*, 16 M.J. at 381.

The *Manual* is an Executive Order. See Exec. Order No. 12,473 (Apr. 13, 1984), 49 Fed. Reg. 17,152 (1984), as amended by Exec. Order No. 12,484 (July 13, 1984), 49 Fed. Reg. 28,825 (1984). The Rules for Courts-Martial, which are part of the *Manual*, "govern the procedures and punishments in all courts-martial and, whenever expressly provided, preliminary, supplementary, and appellate procedures and activities." See *Manual* II-1. The text of RCM 1004 was subsequently modified by additional Executive Orders. See Exec. Order No. 12,550 (Feb. 19, 1986), 51 Fed. Reg. 6497, 6498-6499 (1986); Exec. Order No. 12,767 (June 27, 1991), 56 Fed. Reg. 30,284, 30,293 (1991). The most recent revision of the *Manual* was issued in 1995. It included all amending Executive Orders by the President up to that time. Unless otherwise noted, citations to the *Manual* hereinafter are to the 1995 revision.

robbery, petitioner fired a bullet into the cash register, and demanded that the cashier put money in a paper bag. As he ran out, petitioner fired a round back into the store. He obtained approximately $52 from the second robbery. Pet. App. 3a, 231a.

When the 7-Eleven robberies netted him only a small amount of cash, petitioner conceived a plan to rob taxicab drivers. On the evening of December 12, 1988, he called a taxicab to take him from a store in Killeen to his barracks at Fort Hood. The driver of the taxicab was an active-duty soldier, Christopher Fay, who was working for extra money. Petitioner directed Fay to a secluded area on Fort Hood, where he demanded Fay's money at gun point. After receiving some money from Fay, petitioner shot him in the back of the head. "While looking at the hole in the back of the victim's head and the blood 'gushing out,'" Pet. App. 232a, petitioner cocked his pistol and again shot Fay in the back of the head, killing him. *Id.* at 3a-4a, 231a-232a.

Petitioner walked to his barracks and, after counting the money he obtained from Fay, called a second taxicab. That cab was driven by retired Army sergeant Bobby Sharbino. Petitioner directed Sharbino to a secluded street in Killeen, where he robbed Sharbino of his money pouch, wallet, and other personal effects. Petitioner then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. Pet. App. 4a, 232a.

Later that evening, petitioner took his girlfriend to a nightclub in Killeen. Upon leaving, petitioner and his girlfriend entered a taxicab driven by Howard Harrison. After dropping his girlfriend off near her residence, petitioner directed Harrison to a secluded area and robbed him at gun point. Petitioner then attempted to kill Harrison. Harrison struggled with petitioner, disarmed him, and fled. Pet. App. 4a-5a, 232a-233a.

Acting on leads provided by Harrison, law enforcement agents, including agents of the Army Criminal Investiga-

tion Command (CID), arrested petitioner in the afternoon of December 13, 1988. Petitioner was taken to the CID office, where, after being advised of his rights, he made a full videotaped confession describing his crimes in detail. Searches of the area surrounding petitioner's girlfriend's residence, and of the residence and other places frequented by petitioner, resulted in the recovery of the weapon used in the murders and robberies, spent and unspent bullets, petitioner's blood-stained jacket, and effects taken from the murder victims. Pet. App. 5a, 6a-7a, 232a n.2, 233a. Later, while incarcerated at the U.S. Army facility at Fort Riley, Kansas, petitioner told a fellow inmate that he had committed the first murder "to see if he could get away with it," and the second murder "because it was fun." He subsequently added that, "if he had to do it over, the only difference is he wouldn't get caught." *Id.* at 68a-69a.

An eight-member general court-martial panel unanimously found petitioner guilty of the premeditated murder of Sharbino and of the felony murder of Fay. By a non-unanimous vote, the court-martial also found petitioner guilty of attempting to murder Harrison, of robbing Sharbino and Harrison, and of robbing the 7-Eleven stores. Pet. App. 8a-9a.[2] After a hearing conducted in accordance with RCM 1004, the court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery (see RCM 1004(c)(7)(B)); that, in the felony murder of Fay, petitioner acted as the triggerman (see RCM 1004(c)(8)); and that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case (see RCM 1004(c)(7)(J)). Pet. App. 253a-254a. The court-martial unanimously sentenced petitioner to

[2] In addition, petitioner was also found guilty of the premeditated murder of Fay, the robbery of Fay, and the felony murder of Sharbino. After the findings were announced, the military judge dismissed those specifications as multiplicitous. Pet. App. 9a.

death, a dishonorable discharge, and forfeiture of all pay and allowances. The convening authority approved the findings and sentence. *Id.* at 9a, 230a.[3]

3. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 229a-256a. In accordance with Article 66 of the UCMJ, 10 U.S.C. 866, the court independently weighed the evidence and "agree[d] with each of the aggravating factors found by the court-martial." Pet. App. 254a. The court also found "that any extenuating and mitigating circumstances are substantially outweighed by the aggravating circumstances." *Ibid.*

On appeal, petitioner argued that Article 118 of the UCMJ, 10 U.S.C. 918, is unconstitutional under *Furman* v. *Georgia*, 408 U.S. 238 (1972) (per curiam), in that it does not sufficiently narrow the class of death-eligible defendants, and that the President exceeded his authority under the Constitution and the UCMJ in promulgating RCM 1004 to provide specific aggravating factors. The court found those claims foreclosed by *United States* v. *Curtis*, 32 M.J. 252 (C.M.A.) (J.A. 88-131), cert. denied, 502 U.S. 952 (1991). Pet. App. 230a.

The *Curtis* court concluded that, under the UCMJ, the President has long "play[ed] the major role in determining what punishments may be imposed by courts-martial." J.A. 107. It held that several provisions of the UCMJ, particularly Articles 18, 36, and 56, 10 U.S.C. 818, 836, and 856, authorized the President to promulgate aggravating factors for capital cases. J.A. 107-108. Relying on *Mistretta* v. *United States*, 488 U.S. 361 (1989), the *Curtis* court rejected a separation-of-powers challenge to

[3] The "convening authority" is the commander who convenes the court-martial. The convening authority selects the court-martial members, directs that the accused be tried by the court-martial for the charged offenses, and conducts a post-trial review of the proceedings. Upon such review, he is empowered to dismiss any charge or specification by setting aside the finding of guilty or "approve, disapprove, commute, or suspend the sentence in whole or in part." See Art. 60, UCMJ, 10 U.S.C. 860.

that authorization, noting that "[i]n view of [the President's] inherent constitutional authority [as Commander-in-Chief of the Army and Navy], a separation-of-powers objection has much less merit in the present context than if the 'aggravating factors' for capital cases tried by courts-martial had been formulated by a specially created commission." J.A. 106. *Curtis* also rejected the contention that Congress failed to give the President an intelligible principle for the exercise of his authority, explaining that adequate standards are furnished by the UCMJ's direction in Article 36(a) that the President "shall, so far as he considers practicable," apply "the principles of law" that are generally recognized in the trial of criminal cases in federal district courts. J.A. 113-122.

4. The Court of Appeals for the Armed Forces affirmed. Pet. App. 1a-227a. The court summarily rejected, on the authority of *Curtis* and *Matthews*, petitioner's claims that the President lacked constitutional and statutory authority to promulgate RCM 1004. Pet. App. 141a-142a.

SUMMARY OF ARGUMENT

Article 118 of the Uniform Code of Military Justice (UCMJ) expressly provides that a servicemember who commits premeditated or felony murder "shall suffer death or imprisonment for life as a court-martial may direct." 10 U.S.C. 918. Rule for Courts-Martial (RCM) 1004, first promulgated by the President in 1984, provides that only a sub-class of those eligible for the death penalty under Article 118—*i.e.*, those who are guilty of certain forms of aggravated conduct—may be sentenced to death by a court-martial. The President's action was authorized by other provisions of the UCMJ and by the President's own powers under Article II of the Constitution. It does not violate the separation-of-powers doctrine or the Eighth Amendment.

A. The UCMJ authorizes the President's action because Articles 18 and 56 of the UCMJ provide that the

President may limit the punishment that courts-martial may impose, including—as Article 18 makes clear—"the penalty of death when specifically authorized by" the UCMJ. 10 U.S.C. 818, 856. Article 36(a) further provides that the President may prescribe "post-trial procedures" for cases arising under the UCMJ to conform to the "principles of law * * * generally recognized" in the trial of federal criminal cases. 10 U.S.C. 836(a). In addition, the constitutional powers conferred on the President as Commander-in-Chief independently authorize him to regulate military punishments, within the bounds authorized by statute, because such punishments always have been understood to be an aspect of military obedience and discipline. Because the Constitution also enjoins the President to "take Care that the Laws be faithfully executed," Art. II, § 3, it was especially appropriate for him to exercise his statutory and constitutional authority to promulgate RCM 1004, because by so doing he removed arguable Eighth Amendment defects in the procedures by which Article 118 is implemented and thereby ensured that it is enforced as contemplated by Congress.

There is no merit to petitioner's argument that under separation-of-powers principles Congress alone may promulgate aggravating factors. This Court has long recognized that it is appropriate for Congress to grant the President broad authority in areas in which the Constitution also gives him independent power to act. That principle applies with special force with respect to the armed forces and the President's role as their Commander-in-Chief, and Congress has a long-standing practice of leaving the regulation of military punishments, including death when authorized by statute, to the Executive. Nothing in the Eighth Amendment requires a different conclusion, because this Court has never construed that provision to embody its own separation-of-powers doctrine.

B. There is no greater merit to petitioner's claim that the UCMJ's grant of authority to the President is not

cabined by constitutionally adequate standards. In enacting Articles 18 and 56, Congress must have contemplated that the President would exercise his authority to limit sentences by reference to the considerations that traditionally have controlled similar exercises of his discretion, including the needs of military discipline, and the policy of providing for evenhanded imposition of court-martial punishments across the country. Article 36(a) gives the President additional guidance by referring him to "principles of law * * * generally recognized" by federal district courts. Those principles include the Eighth Amendment decisions of this Court and other death penalty statutes on which the President relied in promulgating RCM 1004.

ARGUMENT

THE PRESIDENT PROPERLY PROMULGATED RULE FOR COURTS-MARTIAL 1004 TO LIMIT THE CLASS OF CASES IN WHICH THE DEATH PENALTY, WHEN IT OTHERWISE IS EXPRESSLY AUTHORIZED BY THE UNIFORM CODE OF MILITARY JUSTICE, MAY BE IMPOSED

The linchpin of the arguments advanced by petitioner and his amici is the assumption, nowhere demonstrated, that *Furman* v. *Georgia*, 408 U.S. 238 (1972), and its progeny, rendered Article 118 of the UCMJ, 10 U.S.C. 918, in which Congress expressly authorized the death penalty for certain murders committed by military personnel, a nullity. Because of that assumption, petitioner contends that the President must be deemed to have defined new crimes punishable by death—*i.e.*, to have prescribed "what acts would be punished as criminal offenses and what the punishment should be for those offenses." Pet. Br. 6; see also ACLU Br. 7. That assumption, however, is wrong. See, *e.g.*, *Dobbert* v. *Florida*, 432 U.S. 282, 297-298 (1977).[4] *Furman* and its progeny held that

[4] *Dobbert* rejected the defendant's argument that there "was no death penalty 'in effect' in Florida" at the time of his crime because Florida had not yet acted to comply with the dictates of *Furman*. *Dobbert* accordingly upheld retroactive application to the defendant of that State's post-*Furman* capital sentencing law on the ground that the changes were merely procedural. 432 U.S. at 296, 297.

the Eighth Amendment prohibits the imposition of the death denalty under procedures that create a substantial risk that it will be inflicted in an arbitrary manner. See *e.g.*, *Lewis* v. *Jeffers*, 497 U.S. 764, 774 (1990). Those cases did not rule unconstitutional Congress's judgment that death is a lawful punishment for premeditated or felony murder in the military justice system.[5] Instead, as the Court of Military Appeals recognized in *United States* v. *Matthews*, 16 M.J. 354 (1983), those cases require only that appropriate safeguards exist in order for a death penalty statute to be *implemented* in a constitutional manner—*i.e.*, that the fact-finder's judgment reasonably separate the murder committed by the defendant from the general class of all murders. See, *e.g.*, *Tuilaepa* v. *California*, 114 S. Ct. 2630, 2634-2635 (1994); *Romano* v. *Oklahoma*, 114 S. Ct. 2004, 2009 (1994); *Lowenfield* v. *Phelps*, 484 U.S. 231, 244 (1988).[6]

[5] See *Schick* v. *Reed*, 419 U.S. 256, 260, 267 (1974) (expressly leaving undecided whether *Furman* analysis applies to the military); cf. *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (citing Article 118 as appropriately informing decision whether there is a national consensus against execution of underage offenders, thereby apparently assuming that Article 118 remains in effect); *Weiss* v. *United States*, 114 S. Ct. 752, 760-761 (1994) (noting that the constitutional tests and limitations applicable in the military context may differ from those the Court has developed for civilian society).

[6] While we need not quarrel here with *Matthews'* limited holding that the Constitution requires additional findings as to aggravation in cases brought under Article 118, this Court's subsequent cases have cast doubt on the court's imposition of that requirement. In *Lowenfield* v. *Phelps*, 484 U.S. 231 (1988), this Court held that the "narrowing" required by the Eighth Amendment may be inherent in the definition of the crime and occur at the penalty phase. See *Tuilaepa*, 114 S. Ct. at 2634-2635; *Romano*, 114 S. Ct. at 2009. In enacting Article 118, Congress could reasonably have concluded

Thus, contrary to petitioner's basic submission (Br. 39-43), Congress in this case *has* exercised its constitutional authority to "creat[e] [the] offense[] [and] fix[] * * * the punishment therefor," *Kinsella* v. *Singleton*, 361 U.S. 234, 246 (1960); see *Solorio* v. *United States*, 483 U.S. 435, 438-439 (1987), by providing in Article 118 that any servicemember guilty of premeditated murder or felony murder may be sentenced to death. "The statute, not the [President], fixes the penalty," *United States* v. *Grimaud*, 220 U.S. 506, 522 (1911), and the President, "in order to administer the law and carry the statute into effect," did "not go outside of the circle of that which the [UCMJ] itself ha[s] affirmatively * * * treated as unlawful if done." *Id.* at 518. That power to make the UCMJ system work in light of judicial rulings and other changed circumstances was clearly conferred on the President by the Constitution and by "entirely appropriate delegations of discretionary authority by Congress." *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. 212, 222 (1989) ("without doubt" Congress may confer upon the Executive "the authority to prescribe all needful rules and regulations" for the enforcement of the Internal Revenue Code, "including all rules and regulations as may be necessary by reason of any alteration of law") (internal quotation marks omitted).

In addition to his constitutional authority as President, three specific provisions of the UCMJ make clear that the President has the power to restrict the class of defendants who may be sentenced to death in the military jus-

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that those whom the government trains to kill have a special obligation of restraint that makes their commission of murder more morally culpable than the general class of homicides committed by a civilian. Such a breach of trust also impairs the effectiveness of an essential government function, because it undermines public confidence in the armed forces on which the citizenry depends for its security. Those factors serve to make Article 118 applicable "only to a subclass of defendants convicted of murder." *Tuilaepa*, 114 S. Ct. at 2635.

tice system. Article 18, 10 U.S.C. 818, which sets forth the jurisdiction of general courts-martial, provides that such courts-martial "may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this chapter, including the penalty of death when specifically authorized by this chapter." Article 36(a), 10 U.S.C. 836(a), empowers the President to prescribe "trial[] and post-trial procedures * * * for cases arising under [the UCMJ] triable in courts-martial" by regulations that "shall, so far as [the President] considers practicable, apply the principles of law * * * generally recognized in the trial of criminal cases in the United States district courts." And Article 56, 10 U.S.C. 856, authorizes the President to limit the maximum punishment a court-martial may impose.

Those provisions plainly authorize the President to provide that fewer than all the defendants whom Congress has made eligible for the military death penalty may actually suffer that punishment, by incorporating into the Rules for Courts-Martial (RCM) the procedures that this Court's Eighth Amendment cases have upheld as constitutionally sufficient in the civilian context. The President's decision to exercise his constitutional and statutory authority in that manner not only removed any arguable Eighth Amendment infirmity in how the military death penalty is implemented,[7] but also is consistent with Congress's long-standing practice, dating back to the framing of the Constitution, of confiding similar decisions to the judgment of the Executive.

A. Nothing In The Constitution Requires That Congress Itself Determine Which Capital Defendants Are Executed

Petitioner contends (Br. 7-16, 37, 42-43) that the Framers of the Constitution gave Congress the exclusive

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[7] Significantly, petitioner makes no claim that the aggravating factors promulgated by the President in RCM 1004 would fail to satisfy the Eighth Amendment's requirement of "narrowing" if those factors had been enacted by Congress.

authority to promulgate rules, regulations, and punishments to be applied by courts-martial, that the Framers never intended "the President's powers to be broad enough to establish policy or rules for the government and regulation of courts-martial," Br. 10, and that accordingly the President's exercise of such "legislative" authority in promulgating RCM 1004 violates the nondelegation doctrine and the Eighth Amendment. There is no merit to those claims, which ignore not only the President's independent role in the constitutional scheme but also 200 years of our Nation's history.

1. There is no basis for petitioner's suggestion (Br. 7-8) that, because Article I vests in Congress the authority to make rules for the government of the armed forces, Congress's ability to seek the aid of the Executive in this area is subject to special restrictions. See *Skinner* v. *Mid-America Pipeline Co.*, 490 U.S. at 220-221 (no distinction in Article I powers, including power to "raise and support Armies" or to " 'make Rules for the[ir] Government' * * * in terms of the scope and degree of discretionary authority that Congress may delegate to the Executive"); see also *id.* at 222-223. Here, far more pertinent than the specific head of Article I power invoked by Congress is the long-standing principle that the limits on Congress's ability to confer authority on the Executive Branch—under *any* of its Article I powers—are "less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter." *United States* v. *Mazurie*, 419 U.S. 544, 556-557 (1975) (delegation to Indian tribe of authority to regulate liquor, which gave rise to federal criminal penalties); see also *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-543 (1950) (immigration); *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 12 (1926) (Commander-in-Chief power); *Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 387-388 (1813) (foreign affairs).

That principle is illustrated by *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). In that case, Congress had given the President authority to prohibit arms sales to warring South American countries, with whatever exceptions he might prescribe, if he should conclude that such a prohibition would "contribute to the re-establishment of peace" there. *Id.* at 312. That authorization was attacked as an impermissible delegation of legislative power that was "controlled by no standard." *Id.* at 314-315. Emphasizing the "unbroken legislative practice * * * almost from the inception of the national government," *id.* at 322, which provided for the President to exercise primary control over matters involving foreign affairs, this Court rejected that challenge:

> It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations * * *.

Id. at 319-320. The Court made the same point in *Knauff*, in rejecting an alien's challenge to her exclusion from the United States pursuant to authority delegated by statute to the President:

> [T]here is no question of inappropriate delegation of legislative power involved here. The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation. * * *
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> * * * Normally Congress supplies the conditions of the privilege of entry into the United States. But because the power of exclusion of aliens is also inherent in the executive department of the sovereign, Congress may in broad terms authorize the executive to exercise the power, *e.g.*, as was done here, for

> the best interests of the country during a time of national emergency.

338 U.S. at 542-543.

The same is true here, because the authority exercised by the President is "cognate to the conduct by him," *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 422 (1935), of his constitutional duties. "The power of the executive to establish rules and regulations for the government of the army, is undoubted," *United States* v. *Eliason*, 41 U.S. (16 Pet.) 291, 301 (1842), because the Constitution "invests the President, as Commander in Chief, with the power to * * * carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces." *Ex parte Quirin*, 317 U.S. 1, 26 (1942); see also *Kurtz* v. *Moffitt*, 115 U.S. 487, 503 (1885) (army regulations providing rewards for the capture of deserters "derive their force from the power of the President as commander-in-chief, and are binding upon all within the sphere of his legal and constitutional authority"); William Winthrop, *Military Law and Precedents* 31 (2d ed. 1920) (Commander-in-Chief "may, in the due execution of the laws for the government of the army, make needful and proper regulations without any legislative authority whatever"); *id.* at 27, 59.

The Commander-in-Chief's constitutional authority easily encompasses the regulation, within prescribed statutory bounds, of punishments imposed in the military. As the Court of Claims noted in a landmark case, in which this Court later concluded that the President has inherent power to convene courts-martial in the absence of legislation expressly prohibiting him from doing so:

> [T]here remains the significant fact in our military system that the President is always the commander in chief. Congress may increase the Army, or reduce the Army, or abolish it altogether; but so long as we have a military force Congress can not take away from the President the supreme command. * * *

> * * * The power to command depends upon discipline, and discipline depends upon the power to punish * * *. If the President has no authority in matters pertaining to military tribunals unless it be "expressly" granted by Congress, then Congress * * * could practically defeat the express declaration of the Constitution and strip the office of commander in chief of all real powers of command.

Swaim v. *United States*, 28 Ct. Cl. 173, 221-222 (1893), aff'd, 165 U.S. 553, 566 (1897) ("We have felt constrained to, at least briefly, consider the several propositions urged upon us * * *, though we might well have contented ourselves with a reference to the able and elaborate opinion of the Court of Claims.").[8]

It is especially appropriate for the President to exercise that power in order to ensure that criminal statutes duly enacted by Congress in this setting—such as Article 118 of the UCMJ—are enforced in accordance with constitutional guarantees. Article II of the Constitution, in addition to providing that the "President shall be Commander in Chief of the Army and Navy," Art. II, § 2, Cl. 1, imposes on the President the duty to "take Care that the Laws be faithfully executed," Art. II, § 3, and he must swear or affirm that he will "faithfully execute the Office * * * and will to the best of [his] Ability, preserve, protect and defend the Constitution of the United States." Art. II, § 1, Cl. 8. See also *In re Neagle*, 135 U.S. 1, 63-

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[8] In affirming, this Court also quoted at length from an 1835 report by the Senate Judiciary Committee. That report noted that the 1806 Articles of War, in expressly authorizing certain named officers to convene courts-martial, did not intend to "exclude the inherent power residing in the President of the United States under the Constitution. * * * [Those articles] do not in any manner control or restrain the commander-in-chief of the army from exercising the power which the committee think, in the absence of legislation expressly prohibitive, resides in him from the very nature of his office, and which, as has been stated, has always been exercised." 165 U.S. at 557-558.

68 (1890); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981) ("we must have 'due regard to the fact that this Court is not exercising a primary judgment but is sitting in judgment upon those who also have taken the oath to observe the Constitution and who have the responsibility for carrying on government' "). Those constitutional duties surely enable the President to use his authority as Commander-in-Chief, and all authority conferred upon him by statute, to eliminate any procedural infirmities in the administration of the punitive articles of the UCMJ, so as to allow for those articles to be "faithfully executed" and to retain the force Congress intended them to have in the governance of the armed forces.

Indeed, the appropriateness of Congress's entrusting the Commander-in-Chief, in light of his special place in the constitutional scheme, with special duties with respect to the armed forces was recognized by this Court as early as 1827, in *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19. The Court rejected Mott's challenge to the jurisdiction of the court-martial that had convicted him for failing to serve in the New York militia, which had been called into service by the President during the War of 1812 in accordance with a statute authorizing him to do so when he "judge[d] [it] necessary to repel [an] invasion." *Id.* at 31. Speaking through Justice Story, the Court rejected (*id.* at 32) Mott's attempt to apply to "the delegation and exercise of this power" the "same principles * * * as might be applied to the humblest officer in the government":

> The power itself is confided to the executive * * *, to him who is, by the constitution, "the commander-in-chief of the militia, when called into the actual service of the United States," whose duty it is to "take care that the laws be faithfully executed," and whose responsibility for an honest discharge of his official obligations is secured by the highest sanctions. * * * It is no answer, that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since, in addition to the high qualities which the executive must be presumed to possess, * * * the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

Id. at 31-32.[9]

2. That the President may exercise the type of authority at issue here is also confirmed by Congress's long-standing practice, from the founding of our Government, of deferring to the President (or his subordinate, the court-martial) on questions of military discipline and punishment, including the circumstances that warrant the penalty of death when otherwise authorized by statute. "This Court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs, long acquiesced in, fixes the construction to be given its provisions." *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 412 (1928); see also *Curtiss-Wright Export Corp.*, 299 U.S. at 327-329; *Stoutenburgh* v. *Hennick*, 129 U.S. 141, 147 (1889) (upholding grant of lawmaking power to District of Columbia since "the cre-

[9] Justice Story went on to reject Mott's claim—which recalls petitioner's argument that the President's power should be more circumscribed in peacetime—that he should not have been tried by court-martial "three years and more after the war was concluded, and in a time of profound peace." 25 U.S. (12 Wheat.) at 37. In words equally applicable to petitioner's effort to qualify the unrestricted language of the UCMJ, Justice Story noted that the power conferred by the statute at issue was not "in any shape dependent upon the fact of war or peace." *Ibid.*

ation of municipalities exercising local self-government" is sanctioned by "immemorial practice").[10]

At the inception of the American Revolution, the British Articles of War then in effect defined offenses subject to trial by court-martial but directed that, in the case of most offenses, the defendant be punished "according to the Nature of his Offence at the Discretion of the Court-martial." See British Articles of War of 1765, Section VI, Art. II, *reprinted in* Winthrop, *supra*, App. VII at 934 (absence without leave). The Second Continental Congress adopted a similar system for imposing punishment following a court-martial conviction. Thus, the American Articles of War of 1775, which were based upon the British Articles, see *Manual For Courts-Martial, U.S. Army 1917* at ix, likewise defined offenses subject to trial by court-martial but vested the court with almost unfettered discretion in fixing punishment.[11] The following year, when the Continental Congress adopted a new set of articles, it again afforded to courts-martial similar discretion in determining an appropriate punishment.[12] Under the Articles of Confederation, the Congress continued this practice when, in 1786, it adopted "Rules and Articles for the administration of justice in the holding of courts-martial." See, *e.g.*, American Articles of War of

[10] See also *Mistretta* v. *United States*, 488 U.S. 361, 390 (1989); *Bowsher* v. *Synar*, 478 U.S. 714, 723-724 (1986); *Marsh* v. *Chambers*, 463 U.S. 783, 790 (1983); *Walz* v. *Tax Comm'n*, 397 U.S. 664, 678 (1970); *Field* v. *Clark*, 143 U.S. 649, 691 (1892).

[11] See, *e.g.*, American Articles of War of 1775, Art. VII, *reprinted in* Winthrop, *supra*, App. IX at 954 (defendant, upon conviction for striking or disobeying superior officer, "shall suffer such punishment as shall, according to the nature of his offence, be ordered by the sentence of a general court-martial").

[12] See, *e.g.*, American Articles of War of 1776, Section VI, Art. 1, *reprinted in* Winthrop, *supra*, App. X at 963 (upon conviction for desertion, defendant "shall suffer death, or such other punishment as by a court-martial shall be inflicted").

1786, Art. 12, *reprinted in* Winthrop, *supra*, App. XI at 973 (persons causing riots in order to disturb court-martial proceedings to be "punished at the discretion of the said court-martial").

The adoption of the Constitution and the Bill of Rights did not alter the antecedent understanding concerning the proper allocation of sentencing responsibility in courts-martial between the Congress and the Executive. While Secretary of War Knox noted in 1789 "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution," Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 Harv. L. Rev. 1, 8 (1958) (Wiener I) (quoting I *American State Papers Military Affairs* 6 (Lowrie & Clarke eds., 1832)), the First Congress evidently did not conclude that any significant revisions would be required, because it continued the Continental Articles of War without change in 1789, see Act of Sept. 29, 1789, ch. 25, § 4, 1 Stat. 96, and simply reenacted them again in 1790 "as far as [they] may be applicable to the constitution of the United States." Act of Apr. 30, 1790, ch. 10, § 13, 1 Stat. 121; see also Act of July 1, 1797, ch. 7, § 8, 1 Stat. 525 (same for navy).

Congress continued to rely on established military law in new articles for the government of the navy, which were adopted in 1799. Those articles "follow[ed] the Continental articles closely," were adopted "without a word of recorded debate," Wiener I, *supra*, 72 Harv. L. Rev. at 14, and provided categorically that "[a]ll murder shall be punished with death," Act of Mar. 2, 1799, ch. 24, § 1, Art. 29, 1 Stat. 713—a punishment that was made discretionary one year later.[13] Indeed, no significant

[13] In 1800, Congress adopted new rules for the government of the navy, which authorized, but did not require, the death penalty in cases of murder committed "without the territorial jurisdiction"

debate on the question of military punishments occurred until 1805, when Congress undertook a more detailed review and revision of rules for the government of the army in order to "adapt[] [them] to the provisions under the present government." 15 Annals of Cong. 263 (1805) (statement of Rep. Varnum); see also Wiener I, *supra*, 72 Harv. L. Rev. at 8.

During debate in the House of Representatives the following year, Representative Campbell of Tennessee repeatedly moved to strike the death penalty as a punishment that could permissibly be imposed by courts-martial. According to the Annals of Congress:

> In support of this amendment, Mr. Campbell reprobated the idea of the lives of citizens being in the power of a court martial. He compared soldiers to mere machines, from the severity of the military law; he said almost every article in the bill was stained with blood; he drew a parallel between them, and the civil penal laws; and that when men know how small offences subjected them to death, they would be deterred from or disgusted in serving their country.

15 Annals of Cong. 326 (1806); see *Kinsella*, 361 U.S. at 248-249. That proposal was "strenuously opposed" (15 Annals of Cong., 326 (1806)) by other members of the House, who were veterans of the Revolutionary War. See Wiener I, *supra*, 72 Harv. L. Rev. at 20. Those members

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of the United States. See Act of Apr. 23, 1800, ch. 33, § 1, Art. XXI, 2 Stat. 48. Other provisions of the 1800 articles, however, appeared to incorporate that punishment for offenses committed in the United States. See Art. XVII, 2 Stat. 47 ("All offences committed by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea."); Art. XXXII, 2 Stat. 49 ("All crimes committed by persons belonging to the navy, which are not specified in the foregoing articles, shall be punished according to the laws and customs in such cases at sea.").

> represented the necessity of the bill standing as it had hitherto done in this respect. They drew a picture of the Army without discipline, where every soldier might think himself at his own disposal—of an army being ordered to attack the enemy, and an officer refusing, and drawing his sword on his commanding officer. The necessity of a code of laws for the military differing from the civil law was demonstrated; and having, by the law as it stands, gone through the Revolutionary war with success, and in peace found no ill consequence arising therefrom, they thought it neither prudent nor safe to adopt the amendment.

15 Annals of Cong. 326-327 (1806).[14] Representative Campbell's motion lost. *Id.* at 327.

Six days later, when the proposed articles of war were again read, Mr. Campbell "moved to recommit the bill to a select committee, with the view of modifying it so as to render more definite the powers of courts martial, and particularly that the power of inflicting the punishment of death should be more guardedly bestowed." 15 Annals of Cong. 338 (1806). That motion, too, was rejected, and the bill passed as proposed. *Ibid.* In the Senate, the only controversy as to punishment resulted from the House's reduction of the number of lashes allowable for certain infractions. The House view prevailed, and the Senate approved the bill as well. President Jefferson signed it on April 10, 1806. See Wiener I, *supra*, 72 Harv. L.

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[14] The principal spokesman on behalf of the opponents of Representative Campbell's amendment was Representative Tallmadge of Connecticut, who had been a prominent officer in the Continental Army and a confidant of General Washington. See *Dictionary of American Biography* 284-285 (1936). Representative Tallmadge "brought forward * * * instances of danger, when soldiers were not subject to severe laws. Soldiers, he observed, were a description of men that must be ruled with severity—and though officers were invested with this authority, they were ever careful in exerting it." 15 Annals of Cong. 327 (1806).

Rev. at 21-22. In the end, the new Articles of War—which were intended to adapt military law to the dictates of the Constitution, and which largely remained substantively unchanged until 1916, see *id.* at 19 & n.138—continued the pre-constitutional practice of defining offenses but affording to courts-martial almost unfettered latitude in fixing punishment, including death where authorized by statute.[15]

In 1890, Congress initiated the practice of directing the President, rather than the court-martial itself, to fix the maximum allowable punishment whenever the sentence was left to the discretion of the court-martial by the Articles of War. See Act of Sept. 27, 1890, ch. 998, 26 Stat. 491. The House Committee Report that accompanied the draft legislation explained that "[a]t the present time courts-martial sitting in different parts of the country, without a common superior, adjudge and impose very unequal penalties for the same offense, and often, it is believed, excessive penalties." H.R. Rep. No. 1051, 51st Cong., 1st Sess. 1 (1890). In urging the legislation's enactment, the Committee added:

> In such offenses the committee believe that there should be some common standard, and think it very fit that the Commander-in-Chief should have the power to prescribe the limit.

Ibid.; see also Act of Aug. 29, 1916, ch. 418, § 3, 39 Stat. 657 (Art. 45) ("Whenever the punishment for a

[15] See Act of Apr. 10, 1806, ch. 20, § 1, Art. 7, 2 Stat. 360 (upon conviction of mutiny, defendant "shall suffer death, or such other punishment as by a court martial shall be inflicted"); Art. 9, 2 Stat. 361 (same—striking or disobeying a superior); Art. 20, 2 Stat. 362 (same—desertion). To the same effect were the American Articles of War of 1874, which made only minor changes to the 1806 enactment, see Wiener I, *supra*, 72 Harv. L. Rev. at 19 n.138. See Winthrop, *supra*, App. XIII at 989 (Arts. 41-46) (each providing that the defendant "shall suffer death, or such other punishment as a court-martial may direct").

crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe").[16] The President's authority to limit punishments extended to the crimes of murder and rape, which were triable by court-martial—except when they were committed within the United States in time of peace—and which under Article 92 of the 1916 Articles of War were punishable by "death or imprisonment for life, as a court-martial may direct." 39 Stat. 664.

In enacting the UCMJ in 1950, Congress repealed the statutory limitations (as to geography and the existence of war) on a court-martial's jurisdiction to try servicemembers for murder, see Art. 118, 10 U.S.C. 918, and it continued its long-standing practice of granting the President discretion to establish, within statutory limits, appropriate sentences and sentencing procedures in courts-martial, see Arts. 18 and 56, 10 U.S.C. 818 and 856. The Rules for Courts Martial, in reliance on that authority, limit the permissible punishments in detail for capital and noncapital offenses alike.[17] See *United States ex rel.*

[16] Pursuant to the authority conferred by the 1890 Act, as reenacted in 1916, President Wilson issued an Executive Order on December 15, 1916, prescribing in detail the maximum sentences (including dishonorable discharge, periods of confinement at hard labor, and forfeiture of pay) for numerous offenses, often calibrated according to the circumstances of the particular offense. See *Manual for Courts-Martial, U.S. Army 1917* at 161-169 (reprinting Executive Order). The 1917 Manual also included further standards for sentencing within the maxima prescribed by the President, taking into account prior convictions, the presence or absence of extenuating or aggravating circumstances, and the individual characteristics of the accused. *Id.* at 159-160 (§§ 342, 343).

[17] The President has exercised his authority to regulate punishments imposed by courts-martial by specifying the types of punishment that may be imposed, RCM 1003, and by providing a maximum punishment for each offense within the maxima established by

Toth v. *Quarles*, 350 U.S. 11, 20 (1955) ("punishment can be raised or lowered at the will of the President"). In so doing, those rules do nothing more than continue an unbroken practice that predates the Constitution itself, and that shows that Congress has always understood the determination of an appropriate court-martial sentence, within maxima established by statute, properly to rest within the competence of the President and his subordinate officials who are the most directly responsible for the maintenance of discipline within the armed forces. Compare *Mistretta* v. *United States*, 488 U.S. 361, 395 (1989).

3. Petitioner and his amici contend, however, that the Framers specifically intended that the Constitution would preclude the President from playing that role in "peacetime" with respect to "civilian" capital offenses. Pet. Br. 13-16; Navy Br. 7-12. That attempt to construct a historical argument to support petitioner's proposed rule is deeply flawed and anachronistic in several respects.

The Fifth Amendment categorically exempts cases "arising in the land or naval forces" from its requirement of a grand jury indictment in every "capital or otherwise infamous crime," which persuasively demonstrates that the Framers contemplated that capital cases of all descriptions—not merely those involving "military" offenses—could be adjudged by the military justice system. The Fifth Amendment also demonstrates that the Framers well knew how to make the existence of war or peace relevant to a servicemember's constitutional protections, because it states that a member of the militia may be deprived of his right to a grand jury indictment only "when [the militia is] in actual service in time of War or public danger." This Court has repeatedly rejected attempts to

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Congress. See *Manual* Part IV paragraph (e) for each offense & App. 12 (Maximum Punishment Chart). In addition, in some cases, the President has defined aggravating circumstances that warrant increased punishment. See, *e.g.*, RCM 1003(d).

extend to the regular army and navy that "wartime" limitation. See, *e.g.*, *Johnson* v. *Sayre*, 158 U.S. 109, 114-115 (1895); *Ex parte Mason*, 105 U.S. 696, 700-701 (1881).[18] Petitioner's attempt to impute to the Framers a special concern with shielding soldiers from the punishment of death is further belied by the legislative debates on the 1806 Articles of War, and in the end completely disregards the fact that significant constitutional restrictions on the permissibility of the death penalty even with respect to civilians are a relatively recent development in our history. See, *e.g.*, *McGautha* v. *California*, 402 U.S. 183, 207 (1971).

In addition, petitioner's emphasis on the "civilian" nature of his capital offense is nothing but an attempt to revive the "service connection" requirement that was rejected by the Court in *Solorio*, *supra*; accord *Smith* v. *Whitney*, 116 U.S. 167, 183-184 (1886) ("Under every system of military law" court-martial jurisdiction extends to punishable acts, "whether those acts are done in the performance of military duties, or in a civil position, or in a social relation, or in private business"). According to petitioner, that requirement makes sense in this context because Congress decided only relatively recently to subject servicemembers to court-martial for capital "civilian" offenses. Petitioner's portrayal of history is at least subject to significant question, because the regulations that Congress adopted for the navy in 1800, while appearing to limit the death penalty to murders committed outside the United States, also provided that "[a]ll offences commited by persons belonging to the navy while on shore, shall be punished in the same manner as if they had been committed at sea." Act of Apr. 23, 1800, ch. 33, § 1,

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[18] See also *Martin* v. *Mott*, 25 U.S. (12 Wheat.) at 37-38 ("The act of 1795 is not confined in its operation to cases * * * in times of public war. * * * It is sufficient for us to say, that there is no such limitation in the act itself"); 15 Annals of Cong. 326 (1806) (death penalty provision should remain because "in peace [we have] found no ill consequence arising therefrom").

Art. XVII, 2 Stat. 47. As this Court noted in *Solorio*, "[a]mong the offenses punishable if committed at sea were murder, embezzlement, and theft," and "[t]his broad grant of jurisdiction to naval courts-martial would suggest that limitations on the power of other military tribunals during this period were the result of legislative choice rather than want of constitutional power." 483 U.S. at 445 n.11. In any event, even if Congress did not authorize early courts-martial to impose capital punishment for a broader range of offenses, that would be extremely weak evidence of a lack of power to do so. See *O'Callahan* v. *Parker*, 395 U.S. 258, 280 n.6 (1969) (Harlan, J., dissenting) ("On such a theory, for example, Congress could not have permissibly waited, as it did, until 1875 to confer federal-question jurisdiction on the district courts; the present-day exercise of this jurisdiction would be unconstitutional") (citations omitted).

Petitioner's argument also overlooks the fact that the early Congresses were creating a system of justice for a force that in 1789 numbered only a few hundred soldiers, and which remained under 3,700 strong when the Bill of Rights was adopted. See Wiener I, *supra*, 72 Harv. L. Rev. at 8-9; *O'Callahan*, 395 U.S. at 280 (Harlan, J., dissenting). Murders of civilians by members of such a small force would not have been a major problem, and could conveniently be dealt with by requiring commanding officers, on pain of being cashiered, to deliver the offender to state authorities. See Wiener I, *supra*, 72 Harv. L. Rev. at 10-11; see also *Caldwell* v. *Parker*, 252 U.S. 376, 381-383 (1920) (discussing evolution of requirement). Without again lapsing into anachronism, petitioner cannot seriously suggest that Congress's choice of that solution reflected any special concern for limiting the soldier's punishment, or preserving to him the benefit of any specific provision of the Bill of Rights. Not only was the death penalty routinely inflicted by the civil courts of the time, but also the Bill of Rights was not made applicable

to the States until after the Fourteenth Amendment was adopted nearly one hundred years later.

Petitioner can derive no greater support from case law than from history, because the cases on which he relies (Br. 9-10) do not bear on the President's authority to regulate court-martial proceedings involving members of the armed forces. In *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952), the question was whether, as Commander-in-Chief, the President could seize private property, when Congress had impliedly *prohibited* that action in the Taft-Hartley Act. See *id.* at 602 (Frankfurter, J., concurring); *id.* at 634, 639 (Jackson, J., concurring); *id.* at 655, 660 (Burton, J., concurring); *id.* at 660, 662 (Clark, J., concurring in the judgment). Similarly, *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866), involved the authority of the President to direct the trial of a *civilian* by a military commission in a jurisdiction where the courts remained open. And *Reid* v. *Covert*, 354 U.S. 1 (1957), also involved the authority of courts-martial to try *civilians* for criminal offenses. *Id.* at 33 (plurality opinion) (noting "the deeply rooted and ancient opposition in this country to the extension of military control over civilians," and citing, *inter alia*, *Milligan*, *supra*). *Reid* recognized that, with respect to members of the armed forces, "Congress has given the President broad discretion to provide the rules governing military trials." *Id.* at 38 (plurality opinion) (citing Art. 36, UCMJ, now codified at 10 U.S.C. 836). Thus, "[i]n each of [those] cases * * * [t]he constitutional question presented turned on the status of the persons as to whom the military asserted its power." *Schlesinger* v. *Councilman*, 420 U.S. 738, 759 (1975). For that reason, those cases are inapposite here.

4. Petitioner is also wrong to contend that the Eighth Amendment independently requires that a legislature, as opposed to any other organ of government, prescribe aggravating factors in cases where the death penalty is otherwise authorized by statute. That suggestion, which

would transform the Eighth Amendment into a separation-of-powers rule applicable to the States, finds no support in this Court's cases. Cf. *Dreyer* v. *Illinois*, 187 U.S. 71, 83-84 (1902) (due process does not require separation of state powers).

Petitioner observes (Br. 19-20; see also ACLU Br. 3-4) that this Court's cases addressing the adequacy of state capital sentencing schemes have, on several occasions, referred to "legislative criteria" limiting the death penalty for certain crimes. See *Zant* v. *Stephens*, 462 U.S. 862, 877 n.15 (1983) (citing *Gregg* v. *Georgia*, 428 U.S. 153, 175, 184 (1976) (plurality opinion)). Those decisions, however, merely reflect this Court's ordinary practice of affording some deference to judgments that legislatures in fact have made. See, *e.g.*, *Gregg*, 428 U.S. at 184; see *id.* at 175 & n.20. They cannot fairly be read to stand for the proposition that the Eighth Amendment *requires* that legislatures make such judgments. Indeed, this Court has repeatedly recognized that aggravating factors may be "legislative or court-imposed." *Zant*, 462 U.S. at 880; see also *Proffitt* v. *Florida*, 428 U.S. 242, 255-256 (1976) (plurality opinion) (state courts can narrow vague statutory factor so as to "provide[] []adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases").[19] This Court's cases therefore provide a complete answer to petitioner's novel attempt to transform the Eighth Amendment

[19] See, *e.g.*, *Arave* v. *Creech*, 113 S. Ct. 1534, 1541 (1993) (noting that state supreme court had adopted a limiting construction and "we believe that construction meets constitutional requirements"); *Walton* v. *Arizona*, 497 U.S. 639, 654 (1990) ("[T]he Arizona Supreme Court has sought to give substance to the operative terms ['especially heinous, cruel or depraved'], and we find that its construction meets constitutional requirements"); *Maynard* v. *Cartwright*, 486 U.S. 356, 360 (1988) (noting that state court could have adopted narrowing requirement to validate otherwise vague aggravating circumstance but failed to do so); *Jurek* v. *Texas*, 428 U.S. 262, 272 (1976) (plurality opinion) (same); *Godfrey* v. *Georgia*, 446 U.S. 420, 428-429 (1980) (plurality opinion).

into a rule for the allocation of authority among branches of the state and federal governments.

5. Petitioner suggests that a different result should obtain here because vesting in the President the authority to specify aggravating factors in military capital cases unconstitutionally unites the power to legislate, prosecute, and sentence in officials of one Branch. Pet. Br. 48-49; see also Public Citizen Br. 28-29; Navy Br. 17-19. As we have explained, however, it is Congress that has legislated, by making murder a criminal offense, authorizing the death penalty for it, and entrusting the implementation of military punishments to the President. In any event, petitioner's assertion, by itself, adds nothing to his claim that Congress may not assign the authority at issue here to the Executive at all, because, if petitioner is wrong on that claim, this Court's cases make clear that the separation-of-powers doctrine does not speak "to the manner in which authority is parceled out within a single Branch." *Touby* v. *United States*, 500 U.S. 160, 167-168 (1991) (rejecting claim that Congress could not assign the power to outlaw certain drugs to the Attorney General, rather than the Secretary of Health and Human Services, "because [the Attorney General] wields the power to prosecute crimes").

Moreover, precisely because the military justice system is at issue, those arguments have little force here. As this Court has frequently noted, "[t]he military is a specialized society separate from civilian society with laws and traditions of its own [developed] during its long history[,] * * * [and whose] primary business * * * [is] to fight or be ready to fight wars should the occasion arise." *Councilman*, 420 U.S. at 757 (internal quotation marks omitted); see *Goldman* v. *Weinberger*, 475 U.S. 503, 506-507 (1986); *Parker* v. *Levy*, 417 U.S. 733, 743 (1974); *Quarles*, 350 U.S. at 17; *Orloff* v. *Willoughby*, 345 U.S. 83, 94 (1953); accord *In re Grimley*, 137 U.S. 147, 151 (1890). Because of the military's unique role in our society, its system of justice has always to some extent

reflected the sharing of functions that petitioner decries. See, *e.g.*, *Runkle* v. *United States*, 122 U.S. 543, 557 (1887) (President's approval of court-martial sentence "is judicial in its character"); see generally Clinton Rossiter, *The Supreme Court and the Commander in Chief* 102-103 (1976) ("The President is the fountainhead of military justice"). That is a reflection of the fact that military justice and punishment are aspects of military discipline, which always has been understood to flow from the President's role as Commander-in-Chief. See *Swaim* v. *United States*, 28 Ct. Cl. at 221-222. To read into the Constitution at this late date a requirement that those powers be fully distributed among different branches of government, "[o]ne must ignore history, tradition, and practice for [more than] two centuries." *Middendorf* v. *Henry*, 425 U.S. 25, 50 (1976) (Powell, J., concurring); see also *Weiss* v. *United States*, 114 S. Ct. 752, 761-762 (1994).

More fundamentally, courts-martial are Article I courts, see *Weiss*, 114 S. Ct. at 760 (holding that the Constitution does not require that military judges have a fixed term of office); *Parisi* v. *Davidson*, 405 U.S. 34, 41 & n.7 (1972); *Dynes* v. *Hoover*, 61 U.S. (20 How.) 65, 79 (1858), and for that reason they not only are subordinate to the President's role as Commander-in-Chief but are also subject to controls prescribed by Congress. In the UCMJ, Congress tempered the historical practice of leaving the infliction of punishment to the Executive by providing significant safeguards for servicemembers. Sentencing decisions in specific cases are not made by the President, but are left to servicemembers who are protected against improper influence or retaliation.[20] See

[20] Moreover, while the President ultimately is responsible for promulgating and amending provisions of the *Manual*, the process by which such amendments are issued is subject to significant internal constraint. Cf. *Mistretta*, 488 U.S. at 303-304. The Secretary of Defense must review the *Manual* annually and recommend appropriate amendments. See Exec. Order No. 12,473 (Apr. 13, 1984), 49 Fed. Reg. 17,152 (1984), as amended by Exec. Order No. 12,484 (July 13, 1984), 49 Fed. Reg. 28,825 (1984). In turn, the Secretary has established the Joint Service Committee on Military Justice, consisting of one representative from the Offices of the Judge Advocates-General of each of the armed forces and the Chief Counsel of the Coast Guard. See DOD Directive No. 5500.17 (Jan. 23, 1985). That Committee reviews the *Manual* each year to ensure that it reflects current military practice and judicial precedent. DOD Directive No. 5500.17, para. (d). Unless expressly exempted by the Secretary, changes proposed by the Committee must be published in the *Federal Register* for notice and comment and at least 75 days allowed for such comment. See 47 Fed. Reg. 3401 (1982); DOD Directive No. 5500.17, para. (e)(3). Following the notice and comment period, the DOD General Counsel must submit the Joint Service Committee's report to both the Office of Management and Budget and the Department of Justice for review and approval before it can be transmitted to the President for final action. See Exec. Order No. 11,030, 27 Fed. Reg. 5847 (1962).

Weiss, 114 S. Ct. at 762 (detailing statutory safeguards against improper influence). The President functions only as an additional safeguard, because no sentence of death imposed by a court-martial may be executed unless he subsequently approves it. See Art. 71, UCMJ, 10 U.S.C. 871. In addition, Article 51 provides that panel members must vote by secret written ballot, and Military Rule of Evidence 606(b) permits court-martial members to be questioned on "whether there was unlawful command influence," and that information may be used to impeach the verdict. See Pet. App. 17a-18a. Finally, as this Court noted in *Weiss*, "[t]he entire system * * * is overseen by the Court of Military Appeals, which is composed of civilian judges * * *. That Court has demonstrated its vigilance in checking any attempts to exert improper influence." 114 S. Ct. at 762. Thus, although the authority to promulgate aggravating factors is vested in the President, his "powers are not united with the powers of the [sentencer] in a way that has meaning for separation-of-powers analysis." See *Mistretta*, 488 U.S. at 393.

In sum, contrary to petitioner's contention, no principle of constitutional law heretofore recognized by this Court requires that Congress itself enact aggravating

factors to narrow the class of defendants who may be sentenced to the death penalty that Congress expressly authorized in Article 118 of the UCMJ. From the earliest days of the Republic, Congress not only has authorized courts-martial to impose capital punishment, but has left to their or the President's discretion the circumstances when that punishment should be imposed.

B. The UCMJ Authorizes Adoption Of RCM 1004 And Provides Constitutionally Adequate Standards For Doing So

Petitioner contends (Br. 16-27; see also ACLU Br. 6-10; Public Citizen Br. 9-21) that even if the Constitution does not always require that Congress prescribe aggravating factors in capital cases, Congress has not in fact authorized the President to do so or, if it has, Congress failed to prescribe constitutionally adequate standards to guide or limit the exercise of the President's judgment. There is no merit to those claims.

1. At the outset, petitioner is wrong to maintain (Br. 21; see ACLU Br. 7; Public Citizen Br. 10, 12; Navy Br. 14) that Articles 18, 36, and 56 of the UCMJ cannot be read to delegate to the President any authority to establish aggravating factors in capital cases, because their enactment substantially predated *Furman*. The question is not whether Congress foresaw this particular applicaiton of those UCMJ articles, but whether RCM 1004 comes within their plain language and general purpose—*i.e.*, to give the President flexibility to limit which punishments may be imposed by courts-martial and authority to ensure that the military justice system, as enacted by Congress, works. It is not the law that a statute can have no effect that was not specifically contemplated by the Congress that enacted it. See *Smith* v. *United States*, 113 S. Ct. 2050, 2059 (1993) (Congress may have "had in mind a more obvious" application of the statute "but the language * * * is not so limited; nor can we imagine any reason why Congress would not have wished its language

to cover this situation") (internal brackets omitted); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985); see also *Moskal* v. *United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history").

Articles 18 and 56 of the UCMJ could not be plainer in scope, and together they grant the President authority to limit punishments otherwise authorized by the UCMJ. Article 18 states that courts-martial may "adjudge any punishment not forbidden by [the UCMJ]"—specifically "including the penalty of death when specifically authorized by [the UCMJ]"—"under such limitations as the President may prescribe." 10 U.S.C. 818. Article 56 similarly provides that punishment may not "exceed such limits as the President may prescribe for that offense." 10 U.S.C. 856. Article 118 expressly authorizes a court-martial to sentence the defendant to death or life imprisonment in cases of premeditated murder or felony murder. It is therefore plainly within the scope of Articles 18 and 56 for the President to "limit" the availability of the death penalty under Article 118 only to those cases, like petitioner's, that involve some form of aggravated conduct.[21]

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[21] It is difficult to understand petitioner's conclusory assertion that Articles 18 and 56 "are irrelevant to this case," because, "[l]ogically, no 'limit' may be set on a penalty of death." Br. 18. If petitioner means to suggest that such authority may be exercised only on a case-by-case basis, and that the death penalty cannot be limited *in any one case*, his argument overlooks the origins of the President's authority to "limit" punishments. Articles 18 and 56 were meant to standardize punishments across the country, see H.R. Rep. No. 1051, *supra*, at 1, and the President has long exercised that authority with respect to *classes* of cases. See, *e.g.*, *Carter* v. *McClaughry*, 183 U.S. 365, 382 (1902) (discussing 1891 use of authority to limit jail terms for enlisted men, but not for commissioned officers). Indeed, the logical implication of petitioner's argument is that the authority to "limit" has no application

An additional basis for such authority is Article 36(a) of the UCMJ, which provides that the President may prescribe "[p]retrial, trial, and post-trial procedures" in all "cases arising under [the UCMJ] triable in courts-martial." 10 U.S.C. 836(a). Petitioner and his amici maintain (Pet. Br. 18-21; ACLU Br. 8-10; Public Citizen Br. 13-15) that Article 36 cannot support RCM 1004, because aggravating factors in capital cases are not matters of "procedure" but are more properly classified as "substantive." ACLU Br. 9.[22] Apart from the difficulty of reconciling that position with *Dobbert* v. *Florida*, *supra*,[23] Congress has clearly expressed its intention that the phrase "[p]retrial, trial, and post-trial procedures" in Article 36(a) be broadly construed. Indeed, Congress amended Article 36 in 1979 to disapprove statements of the Court of Military Appeals to the effect that Article 36, as it then read, narrowly confined the President's au-

whatever with respect to capital cases, a position that renders superfluous Article 18's express inclusion of capital cases within its scope.

[22] The ACLU argues (ACLU Br. 8, 10-11) that aggravating factors in capital cases are not only matters of substance, they "define" or are "elements of [the] crime" and must therefore be articulated by the legislature. That is wrong. "Aggravating circumstances are not separate penalties or offenses, but are 'standards to guide the making of [the] choice' between the alternative verdicts of death and life imprisonment." *Walton*, 497 U.S. at 648 (quoting *Poland* v. *Arizona*, 476 U.S. 147, 156 (1986)); see also *Lewis*, 497 U.S. at 782 (same).

[23] *Dobbert* held that, for purposes of the Ex Post Facto Clause of the Constitution, U.S. Const. Art. I § 9, Cl. 3, a capital sentencing mechanism was "clearly procedural" when it "simply altered the methods employed in determining whether the death penalty was to be imposed" and effected "no change in the quantum of punishment attached to the crime." 432 U.S. at 293-294; accord *Jordan* v. *Watkins*, 681 F.2d 1067, 1079 (5th Cir. 1982); *Irving* v. *State*, 441 So. 2d 846, 852-853 (Miss. 1983), cert. denied, 470 U.S. 1059 (1985); *State* v. *Coleman*, 605 P.2d 1000, 1012-1015 (Mont. 1979), cert. denied, 446 U.S. 970 (1980).

thority to matters relating to the actual conduct of the trial.[24] See S. Rep. No. 197, 96th Cong., 1st Sess. 124-125 (1979). The Committee Report explained that

> [it] believe[d] that [the Court of Military Appeals'] interpretation flies in the face of history; if adopted, it would severely threaten the integrity of the military justice system and undermine the authority of the President as Commander-in-Chief. The committee's amendment clarifies what it believes Congress has always intended by enacting Article 36 and its predecessors. While Congress retains the power to amend the UCMJ to alter the military justice system, it entrusts to the President the promulgation of regulations designed to implement the Code and operate the system.

Id. at 123; see also *Reid*, 354 U.S. at 38 (plurality opinion). The Commander-in-Chief's promulgation of aggravating factors, in order to ensure that capital offenses under the UCMJ remained constitutionally viable in the aftermath of *Matthews*, is, without doubt, the type of rule "designed to implement the Code and operate the system" (S. Rep. No. 197, *supra*, at 123) that Congress had in mind when it enacted and amended Article 36.

Since that amendment, Congress has made even clearer its view that Article 36 gives the President authority to

[24] Prior to the 1979 amendment, Article 36 authorized the President to prescribe "[t]he procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals." See Act of May 5, 1950, ch. 169, § 1, Art. 36, 64 Stat. 120. Significantly, the amendment was expressly intended to repudiate a decision on which petitioner relies to support his claim that Article 36 applies only to purely procedural matters. See Br. 18, citing *United States* v. *Ware*, 1 M.J. 282, 285 & n.10 (C.M.A. 1976) (stating, in dicta, that the phrase "cases before courts-martial" restricted the President's rule-making authority to those aspects of the case concerning the actual trial and excluded, by implication, pretrial and post-trial procedures).

promulgate factors that narrow the class of military accused eligible for the death penalty. In 1985, Congress enacted Article 106a of the UCMJ, 10 U.S.C. 906a, which makes it a capital offense for a servicemember to engage in espionage. See Department of Defense Authorization Act, 1986, Pub. L. No. 99-145, § 534, 99 Stat. 634. The new article enumerates three specific aggravating factors and further states that such aggravating factors may also include "[a]ny other factor that may be prescribed by the President by regulations under section 836 of this title (Article 36)." 10 U.S.C. 906a(c)(4). "[T]he fact that Congress in [1985] authorized the [President] to [promulgate aggravating factors under Article 36] strongly suggests that Congress understood" the UCMJ to confer such authority. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 115 S. Ct. 2407, 2414 (1995); see *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("recogniz[ing] that subsequent legislation declaring the intent of an earlier statute is entitled to significant weight"). The Conference Report on the legislation that became Article 106a makes the point even more clearly. It states:

> Nothing in the new Article 106a is meant to preclude a prosecution under any other article of the UCMJ * * *.
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> * * * * *
>
> The conferees did, however, adopt a statutory formulation of capital sentencing standards for espionage cases and intend that those standards be implemented in a manner consistent with the provisions of Rule for Courts-Martial 1004 of the Manual for Courts-Martial, 1984. The conferees do not intend that the enactment of statutory capital sentencing standards for the new Article 106a be construed as affecting the validity of the regulatory capital sentencing standards that already exist for the other capital punitive articles.

H.R. Conf. Rep. No. 235, 99th Cong., 1st Sess. 425 (1985).[25] The conferees' endorsement of the use of RCM 1004's procedures in espionage cases, and their statement that nothing in Article 106a would preclude prosecution under other provisions of the UCMJ or affect the "validity" of RCM 1004, can only be read as expressing agreement that RCM 1004 is a lawful exercise of Presidential authority.[26]

There is no merit to petitioner's argument (Br. 11, 21-22, 26-27) that Articles 18, 36, and 56 should be construed "narrowly" to preclude the President from adopting RCM 1004, based on the rule of lenity and in order to avoid doubts as to the constitutionality of those articles. It is anomalous to invoke the rule of lenity to support a challenge to the President's decision to *restrict* the class of defendants who are eligible for the death

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[25] To minimize the significance of the 1985 legislation, petitioner cites (Br. 24-25) *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980), for the proposition that "subsequent legislative history provide[s] an extremely hazardous basis for inferring the meaning of a congressional enactment." But as the *GTE* case also recognized (*ibid.*, quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969) (emphasis added)), "[s]ubsequent *legislation* declaring the intent of an earlier statute is entitled to great weight in statutory construction." In this case, both the "subsequent legislation" (Article 106a) and its legislative history express the view that the UCMJ already granted to the President authority to promulgate aggravating factors in capital cases.

[26] Amicus Public Citizen argues (Br. 18-19) that Article 106a evidences Congress's belief that the President lacks authority to promulgate aggravating factors in capital cases, because Article 106a delegates that authority to the President only in espionage cases. The problem with that claim is that Article 106a did not "delegate" that authority to the President; that authority already existed by virtue of Article 36, a provision that is not limited to espionage cases. The point of Article 106a(c)(4) is to ensure that the enumeration of specific factors not be interpreted to oust the President's *pre-existing* authority under Article 36 to promulgate additional factors.

penalty under Article 118, since by conforming sentencing hearings to the dictates of *Furman*, RCM 1004 "provid[es] capital defendants with more, rather than less, judicial protection." *Dobbert*, 432 U.S. at 294-295.

It is no less odd to assert that, to avoid constitutional questions, Articles 18, 36, and 56 must be read to prohibit promulgation of RCM 1004, since that argument is advanced in aid of petitioner's claim that a different provision of the UCMJ—Article 118—is unconstitutional insofar as it authorizes the death penalty for his crimes. Petitioner's invocation of that canon of construction also ignores the fact that the President expressly invoked his constitutional authority under Article II when he promulgated RCM 1004. See Exec. Order No. 12,460, 49 Fed. Reg. 3169 (1984). A conclusion that Articles 18, 36, and 56 do not themselves authorize the President's action therefore not only would be inconsistent with the broad language and the purpose of those provisions, but also would require this Court to decide whether the President has the constitutional power to do so under Article II, even in the absence of affirmative statutory authorization. See *Parker*, 417 U.S. at 744-745 (quoting *Martin*, 25 U.S. (12 Wheat.) at 35-36); see also *Reid*, 354 U.S. at 38 & n.70 (plurality opinion).

If petitioner means to argue that the UCMJ should be read to *prohibit* the President from restricting the class of military defendants who may be sentenced to death under Article 118, that argument would raise serious constitutional questions in its own right, for we doubt that Congress could so bluntly impair the President's authority as Commander-in-Chief. As it happens, however, nothing in the text or legislative history of the UCMJ remotely suggests that Congress has prohibited the President from adopting RCM 1004. To the contrary, the 1985 amendments and the "general tenor of Congress' legislation in this area" demonstrate that Congress has accepted and indeed approved of such action by the President. See *Dames & Moore* v. *Regan*, 453 U.S. 654, 678-688

(1981); *id.* at 668-669; *Haig* v. *Agee*, 453 U.S. 280, 291-292, 300-301 (1981).

In any event, both lenity and the avoidance of interpretations that would raise serious constitutional problems are canons that apply at the *end* of the process of construction, and then only in the face of a statutory "ambiguity." *Concrete Pipe & Prods. of California, Inc.* v. *Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2283 (1993); *Reno* v. *Koray*, 115 S. Ct. 2021, 2029 (1995). Moreover, a statute is not ambiguous "merely because it [is] *possible* to articulate a construction more narrow than that urged by the Government." *Moskal*, 498 U.S. at 108. Here, with the exception of his strained attempt to read narrowly the word "procedures" in Article 36(a), petitioner has not even attempted to offer a coherent interpretation of Articles 18, 36, and 56 that is faithful to the language of those articles, to Congress's long-standing practice of confiding to the Executive judgments as to punishment (including death) within statutory limits, to Congress's 1985 decision to build on the President's ability to exercise the power that petitioner disputes, and to the need to avoid the significant constitutional questions raised by petitioner's own position. For those reasons, petitioner can derive no help from the canons of construction he invokes.

2. Petitioner and his amici are also wrong to argue (Pet. Br. 27-37; ACLU Br. 13-16; Public Citizen Br. 21-25; Navy Br. 12-15) that Articles 18, 36, and 56 fail to provide the President constitutionally adequate guidance for the exercise of the authority they confer. To begin with, the President's independent constitutional authority as Commander-in-Chief of the armed forces would make appropriate even what petitioner characterizes (Br. 31) as a standardless authorization to regulate military sentences. Compare *Curtiss-Wright Export Corp.*, 299 U.S. at 321-322. The President's functions under the UCMJ, "like the Court's function in promulgating procedural rules, are clearly attendant to a central element of the

historically acknowledged mission of the [Executive] Branch." *Mistretta*, 488 U.S. at 391. Where, as in this case, the President has fulfilled his constitutional functions by issuing rules to ensure that courts-martial impose sentences in capital cases in a manner that assures their constitutionality while protecting the needs of military discipline, Congress has no greater duty to specify factors he must consider than it must specify in granting power to the federal judiciary, as an adjunct of its adjudicatory powers under Article III, to make rules for the purpose of ensuring that cases will be adjudicated properly. See, *e.g.*, *id.* at 387-388; *Hanna* v. *Plumer*, 380 U.S. 460, 471-472 (1965); *Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9-10 (1941); *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825); *Bank of the United States* v. *Halstead*, 23 U.S. (10 Wheat.) 51, 61-62 (1825).[27]

Thus, it is "not necessary that Congress supply [the President] with a specific formula for [his] guidance," *Lichter* v. *United States*, 334 U.S. 742, 785 (1948), when, as here, it is appropriate that the President retain flexibility to adapt the broad outlines of congressional

[27] Moreover, in exercising that power to preclude the imposition of the death penalty except in cases of aggravated murder, and to require a sentence of life imprisonment in the remaining cases, the President made a decision that is similar in kind to those he is called upon to make when he commutes a sentence under his constitutional power "to grant Reprieves and Pardons." Art. II, § 2, Cl. 1. See *Schick* v. *Reed*, 419 U.S. 256 (1974); *Ex parte Wells*, 59 U.S. (18 How.) 307 (1856); see also *Biddle* v. *Perovich*, 274 U.S. 480, 487 (1927) (Holmes, J.) (President may order life imprisonment in lieu of death sentence since "[b]y common understanding imprisonment for life is a less[er] penalty than death"). The President is, for that additional reason, uniquely qualified to exercise the sentence-limiting authority granted by Articles 18 and 56 with respect to the death penalty, and, by the same token, it is especially unlikely that Congress would have intended to withhold the power to do so in that setting. In fact, Article 71 of the UCMJ requires that every sentence of death shall be personally approved by the President before it is executed, which ensures an opportunity for commutation. See 10 U.S.C. 871.

policy to changing circumstances in the specialized field of military discipline, over which the Constitution gives Congress and the President shared authority. See *ibid.*; *id.* at 778-779 (Congress's power to confer "authority * * * sufficient to effect its purposes * * * is especially significant in connection with constitutional war powers under which the exercise of broad discretion * * * may be essential"); *Knauff*, 338 U.S. at 543. Nonetheless, history and the background of similar provisions of military law indicate that the nature and scope of the President's discretion were well understood by the political Branches. In light of the long-standing Presidential authority to limit punishments, Congress doubtless expected (see *Grimaud*, 220 U.S. at 518; *United States* v. *Bailey*, 34 U.S. (9 Pet.) 238, 255-256 (1835)) that the authority conferred by Articles 18 and 56 would be exercised by him by reference to the factors that have traditionally informed his judgment—*i.e.*, the needs of military discipline, evenhanded application of court-martial punishments throughout the country, see H.R. Rep. No. 1051, *supra*, at 1, and his own judgment regarding the sorts of factors that would make a statutory sentence unduly harsh as applied to specific circumstances. See *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 105 (1946) (delegation is constitutionally sufficient "if Congress clearly delineates the general policy * * * and the boundaries of th[e] delegated authority"); see also *Yakus* v. *United States*, 321 U.S. 414, 420, 426-427 (1944) (upholding delegated authority to fix commodity prices that in judgment of Price Administrator "will be generally fair and equitable and will effectuate the purposes of" price control legislation); *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 225-226 (1943) (upholding delegation to FCC to promulgate regulations in accordance with its view of the public interest).

In addition, Article 18 contemplates that the President may "prescribe * * * any punishment not forbidden" by the UCMJ. Article 55 of the UCMJ expressly forbids the

imposition of "cruel or unusual" punishments, 10 U.S.C. 855, and the legislative history of the UCMJ shows that Congress had Article 55 specifically in mind when it referred in Article 18 to punishments "forbidden" by the UCMJ. See S. Rep. No. 486, 81st Cong., 1st Sess. 13 (1949); H.R. Rep. No. 491, 81st Cong., 1st Sess. 16 (1949). Accordingly, the President surely must be understood to have the authority under Article 18 to subject sentences to "limitations" necessary to comply with Article 55's prohibition against "cruel or unusual" punishments—a statutory term that he could appropriately interpret by considering, as he did, this Court's decisions construing the parallel language of the Eighth Amendment.

The same result is compelled by the language of Article 36(a), which gives the President still further guidance. Article 36(a) states that the court-martial rules promulgated by the President "shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 10 U.S.C. 836(a). Petitioner nonetheless argues (Br. 31-32, 34; see Public Citizen Br. 23) that Congress established no "principles of law" on which the President could rely, because when RCM 1004 was first promulgated only the federal air piracy statute contained a list of aggravating factors.[28] By the time RCM 1004 was adopted, however, this Court

[28] See Antihijacking Act of 1974, Pub. L. No. 93-366, Tit. I, § 105, 88 Stat. 412-413, codified at 49 U.S.C. 1473(c)(7) (1976). Contrary to petitioner's argument (Br. 34) that the aggravating factors in that statute bear "almost no similarity" to those later adopted by the President, RCM 1004(c)(4)—which addresses the creation of substantial danger to the lives of persons other than the victim—is virtually identical to Section 1473(c)(7)(B)(iii) of the air piracy statute. Similarly, although petitioner maintains (Br. 34) that the aggravating factors contained in Article 106a could not have been relied upon by the President, the Rule was amended in 1986 to reflect those factors. See *Manual* App. 21-73, citing Art. 106a.

had developed a substantial body of case law addressing the adequacy of state capital sentencing schemes. Because those cases set forth Eighth Amendment principles applicable to any capital sentencing scheme enacted by Congress, those cases plainly reflect "principles of law" that must be "recognized" in "the trial of criminal cases in the United States district courts." See, *e.g.*, *United States* v. *Flores*, 63 F.3d 1342, 1369-1373 (5th Cir. 1995). This Court's cases therefore afforded a firm basis upon which the President could rely in formulating constitutionally sufficient aggravating factors.[29]

This Court's decisions are not the only source on which the President could rely in ascertaining appropriate standards pursuant to Article 36. In defining both military and civilian capital offenses, Congress had identified, even before *Furman*, factors that it considered sufficiently egregious to merit the death penalty. See *Stanford* v. *Kentucky*, 492 U.S. 361, 372 n.4 (1989) (collecting laws). The President relied heavily on those congressional judgments. See *Manual* App. 21-69 to 21-74. For example, aggravating factors (c)(2) and (c)(3), which involve the creation of "substantial damage to the national se-

[29] *Gregg* v. *Georgia*, 428 U.S. 153, 193 n.44 (1976) (lead opinion), approved the sentencing standards found in the Model Penal Code, and also upheld the Georgia capital sentencing scheme, which generally follows the Model Penal Code, *id.* at 164-166 & n.9, 196-198 (lead opinion); *McCleskey* v. *Kemp*, 481 U.S. 279, 302 & n.24 (1987); see also *Proffitt* v. *Florida*, 428 U.S. 242, 248 n.6 (1976) (lead opinion). The aggravating factors in Rule 1004 have close analogues in the Model Penal Code and the Georgia and Florida statutes. The drafters of RCM 1004 also relied on other aspects of this Court's Eighth Amendment case law. For example, aggravating factors (c)(8), which limits the circumstances under which the death penalty can be imposed for murder under the felony-murder doctrine, and (c)(9), which specifies the circumstances under which the death penalty can be imposed for the offense of rape, were formulated to conform military capital sentencing practice to this Court's decisions in *Tison* v. *Arizona*, 481 U.S. 137 (1987), and *Coker* v. *Georgia*, 433 U.S. 584 (1977). See *Manual* App. 21-73.

curity of the United States," are based on the fact that, in both the civilian and military contexts, Congress has specifically recognized that such damage may warrant imposition of the death penalty. See *Manual* App. 21-72. Likewise, in enacting 18 U.S.C. 1111 and Article 118(4) of the UCMJ, 10 U.S.C. 918(4), Congress expressly authorized the death penalty for homicides committed during the perpetration of certain violent felonies, including robbery. Aggravating factor (c)(7)(B), which focuses upon the commission of a murder during the commission or attempted commission of such felonies, and aggravating factor (c)(7)(C), which involves the commission of a murder "for the purpose of receiving money or a thing of value," both reflect that congressional determination.[30] Thus, as the *Curtis* court concluded (J.A. 122), in formulating aggravating factors, "the President was not set adrift in an uncharted sea * * * [but] was guided by the Uniform Code and other federal legislation." Indeed, when Congress enacted a new Federal Death Penalty Act in 1994, Pub. L. No. 103-322, Tit. VI, § 60002, 108 Stat. 1959 (codified at 18 U.S.C. 3591-3598), many of the aggravating factors it adopted for capital homicide offenses were virtually identical to those earlier identified by the President in subsection (c)(7) of RCM 1004. See,

[30] Similarly, aggravating factors (c)(7)(F) and (c)(7)(G), which focus upon the victim's status as a senior government official, military superior, law enforcement officer, or public servant, are based upon the congressional determination that such officials merit special protection and that their murder warrants the death penalty. See *Manual* App. 21-73, citing 18 U.S.C. 351, 1114, 1751. The President recently amended aggravating factor (c)(7)(B) by the addition of the fact that the murder was drug related. The amendment was based upon the enactment of "[c]urrent federal statutes [which] provide for a maximum punishment including the death penalty for certain drug-related killings." *Manual* App. 21-73, citing 21 U.S.C. 848(e).

e.g., 18 U.S..C 3592(c)(1), (3)-(8), (12) and (14).[31] With the actions of the President and Congress so closely aligned, petitioner has given this Court no sound reason to overturn the President's judgment in promulgating RCM 1004.

CONCLUSION

The judgment of the United States Court of Appeals for the Armed Forces should be affirmed.

Respectfully submitted.

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[31] Significantly, Congress also provided a catch-all provision authorizing the jury to rely on "any other aggravating factor" of which the defendant has received notice from the prosecutor, irrespective of whether the factor is listed in the statute. See 18 U.S.C. 3592(c). That provision further undermines petitioner's contention that the designation of specific aggravating factors is, and that Congress would expect it to be, peculiarly a legislative choice.

APPENDIX

Article I of the Constitution provides in relevant part:

Section 8. [1] The Congress shall have Power
* * *

* * * * *

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * *

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article II of the Constitution provides in relevant part:

> Section 1. [1] The executive Power shall be vested in a President of the United States of America. * * *
>
> * * * * *
>
> [8] Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States."
>
> Section 2. [1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.
>
> * * * * *
>
> Section 3. He shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; he may, on extraordinary Occasions, convene both Houses, or either of them, and in Case of Disagreement between them, with Respect to the Time of Adjournment, he may adjourn them to such Time as he shall think proper; he shall receive Ambassadors and other public Ministers; he shall take Care that the Laws be faithfully executed, and shall Commission all the Officers of the United States.

Article 55 of the Uniform Code of Military Justice, 10 U.S.C. 855, provides:

> **Art. 55. Cruel and unusual punishments prohibited**
>
> Punishment by flogging, or by branding, marking, or tattooing on the body, or any other cruel or unusual punishment, may not be adjudged by any court-martial or inflicted upon any person subject to this chapter. The use of irons, single or double, except for the purpose of safe custody, is prohibited.

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